No. 07-507

IN THE

Supreme Court Of The United States

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
D/B/A CANCER CARE ASSOCIATES,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS,

Respondent.

JPMORGAN CHASE BANK OF TEXAS, ET AL.,

Real Parties In Interest.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF AOR MANAGEMENT COMPANY OF OKLAHOMA and US ONCOLOGY INC.

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QUESTION PRESENTED

Is the Petitioner entitled to mandamus review of the District Court's interlocutory order denying dismissal under FED. R. CIV. P. 12(b)(1)?

Is the Petitioner entitled to mandamus review of the District Court's interlocutory order compelling arbitration under the FAA?

Did the District Court clearly and indisputably abuse its discretion in denying the Petitioner's motion to dismiss or in compelling arbitration?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, AOR Management Company of Oklahoma Inc. and US Oncology, Inc. refer the Court to the Corporate Disclosure Statement previously included in the Petition For Writ Of Certiorari filed herein by Oklahoma Oncology & Hematology P.C.

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BRIEF IN OPPOSITION TO CERTIORARI

Real Parties in interest AOR Management Company of Oklahoma ("AOR-OK") and US Oncology, Inc. ("USON"), collectively the "Interpleader Claimant Real Parties In Interest," pray that the Court deny the Petition for Writ of Certiorari filed by Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates ("CCA").

STATEMENT OF THE CASE

Summary

This is a dispute over a bank account. CCA claims diversity does not exist for an interpleader action because USON has no real claim of its own. But, the record contains the parties' underlying agreements and ten-year course of dealings, which gave USON ***and*** AOR-OK the right to manage ***and each be reimbursed*** out of the funds in the account. The agreements also contain arbitration clauses, and CCA does not want to arbitrate as it agreed to do.

If there is one thing that should be abundantly clear, it is that interlocutory orders compelling arbitration are only reviewed ***after*** final judgment.[1] So, CCA is attempting to primp its particular arbitration order to evade the final judgment requirement. To do so, CCA claims that the District Court improperly adjudicated its "factual" challenge to jurisdiction; yet, such factual challenges are also

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1 *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 86 & 87 n.2 (2000).

not to be revisited by way of mandamus.[2] The Fifth Circuit's disposition of CCA's request for the extraordinary writ was thus proper, and CCA cannot show a question meriting this Court's review in any event.

Factual Background

1. USON is the nation's largest health-care management company devoted exclusively to the treatment of cancer and cancer research. Through management agreements between its subsidiaries such as AOR-OK and oncology practices, USON manages the business aspects of hundreds of oncology practices in 34 states.

This dispute involves the management of CCA. The two main agreements at issue are a "Purchase Agreement"[3] and a Management Services Agreement (the "MSA").[4] Under the terms of the Purchase Agreement, American Oncology Resources, Inc. (now known as USON) and AOR-OK purchased a medical practice's accounts receivables, equipment, inventory, and certain other assets in exchange for millions of dollars paid to the physician owners of CCA.[5] Under the MSA, the "Business Manager" agreed to manage all of the business aspects of the practice in exchange for a management fee.[6]

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2 *See infra* at 8-13.

3 The Purchase Agreement, omitted from CCA's appendix, was submitted as Exhibit 51 in support of its petition for writ of mandamus. Excerpts appear here as Resp.App.16-22.

4 App.53-131.

5 Resp.App.16-22.

6 App.62, 64-65, 70-72, 77-96, 107-09.

Pursuant to the MSA, the funds disputed here were deposited into a lockbox account maintained by JPMorgan Chase Bank of Texas ("Chase") and referred to under the MSA as the "New PC Account."[7] Although the account was styled in CCA's name, the MSA granted the Business Manager authority to make withdrawals from the New PC Account,[8] and CCA executed an irrevocable power of attorney appointing the "Business Manager" as its "exclusive true and lawful agent and attorney-in-fact" for purposes of handling its funds and accounts.[9]

In order to insinuate that diversity is absent, CCA contends that USON's claim to the funds is a joint claim by USON and AOR-OK based expressly on the MSA to which USON was not a party.[10] The record is otherwise. USON's participation in CCA's management is specifically contemplated by the MSA. The MSA states that American Oncology Resources, Inc. (*i.e.*, USON) shall "succeed to all of Business Manager's rights and obligations" under the MSA.[11] The MSA also contemplates that USON would execute an assignment in favor of AOR-OK, and it did so.[12]

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7 App.47.

8 App.83.

9 App.85.

10 Petition at 8.

11 App.126. American Oncology Resources, Inc. and USON are one and the same because American Oncology Resources, Inc. changed its name to US Oncology, Inc. Resp.App.14-15.

12 App.126; Resp.App.1-3.

AOR-OK, as Business Manager, was in turn permitted to assign its Business Manager functions and its right to collect its management fee to whomever it wished.[13] Here, the record supports a conclusion that USON performed as Business Manager functions on behalf of AOR-OK. Indeed, CCA contended that USON continued to perform some of the functions of the "Business Manager,"[14] meaning USON would be independently entitled to be reimbursed for its own administrative services out of the account designated for that purpose.

2. For reasons that are not material to this proceeding, CCA eventually wanted out of the relationship. When the dispute between CCA, USON and AOR-OK reached the New PC Account, Chase invoked the District Court's interpleader jurisdiction.[15]

3. CCA moved to dismiss on the ground that USON supposedly did not have its own claim to the disputed funds, eliminating diversity of citizenship necessary to adjudicate the claims.[16] The District Court correctly found the flaw in CCA's argument: CCA would essentially require pretrial proof of the merits of USON's claim. The District Court noted that the interpleader statute is liberally construed and requires only that the stakeholder has been or may be subjected to multiple claims.[17] This prerequisite is satisfied by the simple showing of

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13 App.126-27.

14 Resp.App.6-10.

15 App.44.

16 App.26-27.

17 App.28.

"colorable" claims such that the stakeholder "legitimately fears multiple vexation directed against a single fund."[18] The District Court correctly noted (as demonstrated above) that USON has such a colorable claim.[19]

4. The competing claims to the disputed funds obviously arise out of the parties' agreements. Both agreements contain broad arbitration clauses, requiring arbitration to be held in Oklahoma.[20] USON and AOR-OK, therefore, moved to compel arbitration. Not surprisingly, the District Court granted the motion.[21] The District Court did not restrict the parties in terms of ***where*** they elected to hold the arbitration, but ordered that arbitration commence within 30 days and that the parties provide the court a status report on March 30, 2007 and every 30 days thereafter.[22]

5. The status since is this: CCA has been attempting, seriatim, any tactic to delay and avoid the arbitration, no matter how implausible. This proceeding arises from its attempt to obtain review of the interlocutory jurisdictional and arbitration rulings by way of mandamus. Even ignoring that the rulings were correct, neither of the rulings meet the procedural requirements for mandamus review. *See infra* at 8-13. Thus, it is no surprise that the Fifth Circuit made short work of the application and

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18 App.28-29.

19 App.29-30.

20 App.125&127; Resp.App.21-22.

21 App.2-22.

22 App.22.

denied it without opinion two days after the Real Parties in Interest responded.[23]

Unencumbered by any sense of its procedural or jurisdictional situation, CCA also pursued an interlocutory appeal in the complete absence of jurisdiction and sought *en banc* review of its three sentence order denying mandamus.[24] The interlocutory appeal was dismissed for want of jurisdiction prior to briefing on the merits (which this Court will doubtless be asked to review at some point) and the request for *en banc* rehearing was denied without requesting a response or a poll of the court nine days after it was filed.[25]

REASONS TO REFUSE THE WRIT

Certiorari review would be inappropriate here. First, the Court cannot reach the merits of the questions presented because, regardless of the substantive rulings below, neither of the orders about which the Petitioner complains is appropriately reviewed by mandamus. As a consequence, the Fifth Circuit summarily denied mandamus shortly after receiving responses. The Circuit Court made no indication whether it even considered the merits of CCA's position, or instead recognized that mandamus was an inappropriate tool for review.

In that posture, with no opinion on the merits, CCA can hardly show that the Fifth Circuit has entered a decision in conflict with the decision of another United States court of appeals or that the

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23 App.1.

24 Pet. at 13 nn.5 & 14.

25 App.33-34.

Fifth Circuit has decided an important question of federal law that conflicts with relevant decisions of this Court. SUP. CT. R. 10(a) & (c). Regardless of procedural posture, however, a reading of the authorities cited by CCA demonstrates beyond peradventure that CCA cannot show this case to be worthy of certiorari.

On matters of jurisdiction, CCA has cited no authority for the proposition that a District Court must perform an evidentiary inquiry and make findings of jurisdictional facts at ***any*** specific point prior to trial when (as here) the jurisdictional challenge is intertwined with the merits.

On the issue of arbitration, CCA cites Section 4 of the FAA to challenge the power of the District Court to entertain the motion to compel and order arbitration outside its district. Jurisdiction and venue are correct for the interpleader action filed by Chase, and CCA has cited no authority restricting a district court's power to compel arbitration when the contractually "improper" venue was not engineered by one of the parties to the arbitration agreement. As a practical matter, however, the District Court's order merely compelled arbitration ***without identifying*** a location for the hearing. Under the District Court's order, the parties may, by agreement, arbitrate in Oklahoma, or may, by agreement, waive the forum clause and arbitrate in Texas to comply with CCA's reading of the FAA. Here, CCA has no desire to arbitrate in Texas nor can it complain about the choice made by USON and AOR-OK to demand arbitration in Oklahoma as set out in the parties' agreements.[26]

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[26] App.41.

The real question presented is the extent to which CCA's FAA venue cases survive *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), rejecting the view that other, similar FAA venue provisions are strict and mandatory. That issue has not been sufficiently developed in the appellate courts and is not ripe for certiorari review, especially review of a memorandum order denying a petition for writ of mandamus.

I. The Rulings Below Are Not Reviewable By Mandamus

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004); *see also GulfStream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988); *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Three conditions must be satisfied before it may issue, and the types of rulings challenged here do not meet those conditions.

First, mandamus cannot be used as a substitute for the regular appeals process. *Cheney*, 542 U.S. at 380-81; *Fahey*, 332 U.S. at 260. Thus, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380; *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). Second, the petitioner must satisfy the burden of showing that its right to issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381; *GulfStream*, 485 U.S. at 289; *Kerr*, 426 U.S. at 403. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is

appropriate under the circumstances. *Cheney*, 542 U.S. at 381; *Kerr*, 426 U.S at 403.

Because mandamus is not a substitute for the regular appeals process, "mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed . . . ." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943). Here, Congress has expressly limited interlocutory review of a district court decision on arbitration, making mandamus inappropriate as a method to review interlocutory orders compelling arbitration.

Appeal may only be taken from "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3); *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 86 (2000). Appellate review may not be had, however, from an interlocutory order directing arbitration to proceed under Section 4 of the FAA. 9 U.S.C. § 16(b)(2); *Green Tree Fin.*, 531 U.S. at 87 n.2. Consistent with Congress' statutory command, mandamus is routinely rejected where the District Court enters an interlocutory order compelling arbitration under the FAA.[27] To hold otherwise would do "no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted the court's appellate

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[27] *In re Am. Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994) (per curiam); *McDermott Int'l, Inc. v. Underwriters at Lloyds Subscribing to Memorandum of Ins. No. 104207*, 981 F.2d 744, 748 (5th Cir. 1993); *W. of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp.*, 981 F.2d 749, 751 (5th Cir. 1993); *see also Steele v. L.F. Rothschild & Co.*, 864 F.2d 1, 4 (2d Cir. 1988); *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515, 519 (7th Cir. 1984).

review to final judgments of the district court." *Roche*, 319 U.S. at 32.

CCA, therefore, has attempted to muster extraordinary circumstances meriting review through its argument that the District Court lacked jurisdiction to compel arbitration. This, too, is unavailing. CCA claims that it made a factual challenge to jurisdiction, requiring consideration of evidentiary proof. Numerous cases stand for the proposition that mandamus is properly denied when jurisdiction is debatable or is bound up in the disputed facts of the case. *Roche*, 319 U.S. at 31 ("[T]he writ will not issue to review an order overruling a plea to the jurisdiction . . . ."); *In re Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 275-76 (1921) ("If, however, the jurisdiction of the lower court is doubtful . . . , or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record . . . , or if the complaining party has an adequate remedy by appeal or otherwise . . . , the writ will ordinarily be denied.").[28] Because a

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[28] *See also Kaiser Gypsum Co. v. Kelly (In re Sch. Asbestos Litig.)*, 921 F.2d 1310, 1314 (3d Cir. 1990) ("[O]nly if the petitioners show that the district court's lack of subject matter jurisdiction is 'clear and indisputable' and that no other adequate means exists to attain relief should we grant the extraordinary relief requested in these petitions."); *Am. Re-Insurance Co. v. Janklow (In re S.D.)*, 692 F.2d 1158, 1160-61 (8th Cir. 1982) (noting that extraordinary writs not used to review even jurisdictional questions if substantial legal argument can be made in support of jurisdiction); *Ivy v. Diamond Shamrock Chems. Co. (In re Ivy)*, 901 F.2d 7, 10 (2d Cir. 1990) (on petition for mandamus to review transfer order made by Judicial Panel on Multidistrict Litigation, court would

petitioner must show that its right to relief is "clear and indisputable,"[29] mandamus is properly withheld "if the jurisdictional error is not readily apparent, and particularly if it depends upon ***factual issues*** that are not conveniently resolved by an appellate court." 16 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3933.1 at 541 (1996) (emphasis added).

In fact, most of the authorities upon which CCA relies to argue that this action deserves immediate review are not even mandamus cases.[30] Of the few

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not determine whether case properly removed from state court); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 863 (7th Cir. 1984) (per curiam) (finding mandamus would not be used to review denial of motion to remand to state court action removed in apparent defiance of contractual provision for litigation in state court; noting that "[m]ere error is not sufficient to invoke the mandamus process"); *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1065 (5th Cir. Unit A June 1981) (dismissing appeal for lack of jurisdiction and denying mandamus of refusal to order remanding case where defendant's position had some legal support); *United States v. Sorren*, 605 F.2d 1211, 1215-16 (1st Cir. 1979) (mandamus denied on defendant's claim that the district court lacked personal jurisdiction because the writ "is appropriate only when the lower court is clearly without jurisdiction and the party seeking the writ has no adequate remedy by appeal").

[29] *Cheney*, 542 U.S. at 381.

[30] *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005) (reversing final order of dismissal based on Rule 12(b)(6) and Eleventh Amendment immunity); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (affirming imposition of presumed personal jurisdiction as a sanction for discovery

cited authorities actually relating to mandamus, many deny or vacate an extraordinary writ.[31] Indeed, CCA references only three cases in which mandamus was granted. One involves a ruling completely

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abuse); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (reversing final order dismissing action for lack of personal jurisdiction); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (reversing final order to enforce settlement agreement due to lack of federal jurisdiction); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 537 (1967) (reversing improperly granted injunction); *S. Cal. Petrol. Corp. v. Harper*, 273 F.2d 715, 720 (5th Cir. 1960) (affirming final order of dismissal); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 498 (1942) (reversing final order of dismissal); *Morrow v. Harwell*, 768 F.2d 619, 629 (5th Cir. 1985) (reversing in part, vacating in part, and affirming in part final orders requiring changes to jail facilities and rules); *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 163 n.1 (5th Cir. 1998) (affirming final orders denying motion to dismiss action for lack of federal jurisdiction and motion to vacate or modify arbitration award).

[31] *Will v. United States*, 389 U.S. 90, 107 (1967) (vacating writ concerning government's duty to answer criminal defendant's bill of particulars); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943) (vacating writ requiring striking of pleas in abatement to a criminal indictment). In another of CCA's cases, rather than issue an extraordinary writ, this Court vacated the lower court's denial of a writ to overturn discovery orders and remanded the case for further proceedings, noting that "the issuance of the writ is a matter vested in the discretion of the court to which the petition is made." *Cheney*, 542 U.S. at 390.

unlike the 12(b)(1) motion at issue here,[32] and the remaining two, while concerned with jurisdictional issues, do not involve factual challenges.[33]

II. There Is No Circuit Split Concerning The Fifth Circuit's Rulings

A. The jurisdictional ruling

If CCA is to be believed, a district court confronted with a factual challenge to jurisdiction must call a halt to the proceedings, hold jurisdictional discovery, and make fact findings prior to trial, no matter what type of jurisdictional issue is in play. No authority exists for such a proposition, much less authority constituting a circuit split.

First, CCA cannot engineer the roots of a split through any supposed inconsistency between *Land v.*

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[32] *Tenn. v. Taylor,* 169 F.2d 626, 628 (6th Cir. 1948) (mandamus requiring dissolution of injunction against prosecution of state court suit).

[33] One revolves entirely around the sufficiency of the allegations (*see Md. v. Soper*, 270 U.S. 9, 32-34 (1926)), and was only undertaken to preserve the states' ability to "try offenses against its own laws and in violation of its own peace and dignity" as against "the national supremacy." *Id.* at 29-30. The other involves a well-settled legal question, and recognizes that mandamus is not appropriate for jurisdictional questions that are debatable or factual. *BancOhio Corp. v. Fox*, 516 F.2d 29, 33 (6th Cir. 1975) (granting writ concerning removal jurisdiction where the state court had no jurisdiction, but recognizing that mandamus is not appropriate unless assumption or denial of jurisdiction is "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine").

Dollar, 330 U.S. 731 (1947), and *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178 (1936). Both cases recognize the wide discretion of a district court in how to resolve a factual challenge to jurisdiction.[34] Moreover, this Court (unlike CCA) recognized the different treatment afforded jurisdictional facts that are separate from the merits and those that are intertwined with the merits.[35]

All of these concepts are brought forward in the cases upon which CCA relies to create the false impression of a conflict. To the extent CCA's authorities involve factual challenges to jurisdiction at all,[36] CCA's cases generally recognize wide discretion afforded the district court in how and when it will undertake to finally decide the jurisdictional question.[37] When, as here, the facts

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[34] *Land*, 330 U.S. at 735 n.4 ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."); *McNutt*, 298 U.S. at 184 ("The trial court is not bound by the pleadings of the parties, but ***may***, of its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.' " (citations omitted) (emphasis added)).

[35] *Land*, 330 U.S. at 735 ("[T]his is the type of case where the question of jurisdiction is dependent on decision of the merits.")

[36] *Cf. Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (involving only a facial challenge).

[37] *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) ("A court has wide discretion . . . ."); *Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. Unit A Apr. 1981) ([A]n evidentiary hearing ***may, in some instances, be required*** . . . ." (emphasis added)); *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210

that are challenged intertwine with the merits of the case, the appellate courts recognize the discretion of the district court to delay resolution of the question, even to the point of trying the case on the merits.[38] The only two cases that are silent concerning the district court's discretion or require early resolution of the question involve disputes over non-merits

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(7th Cir. 1980) ("[T]he court ***may*** look behind the complaint and view the evidence to determine whether a controversy in fact exists." (emphasis added)); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) ("[A]ny rational mode of inquiry will do." (quoting *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)); *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1303 (10th Cir. 2001) (noting that the court "has wide discretion to allow affidavits"); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) ("[T]he court enjoys broad authority . . . ."); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 n.16 (3d Cir. 1977) ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.")

[38] *Valentin*, 254 F.3d at 363 n.3 ("We note that there is an exception to this praxis for cases in which the jurisdictional facts, though genuinely disputed, are inextricably intertwined with the merits of the case. In that event, the court may defer resolution of the jurisdictional issue until the time of trial."); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (noting that where the jurisdictional facts are intertwined with the facts central to the merits of the dispute, "[i]t is the better view that in such cases the entire factual dispute is appropriately resolved only by a proceeding on the merits"); *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) ("[W]e follow our general rule in holding that a jurisdictional attack intertwined with the merits of an FTCA claim should be treated like any other intertwined attack, thereby making resolution of the jurisdictional issue on a 12(b)(1) motion improper.")

facts,[39] or determinations of immunity, which (unlike here) are entitled to interlocutory review.[40]

In reality, these collected authorities demonstrate why this type of ruling ought ***not*** to be reviewed prior to final judgment. Resolution of a jurisdictional question that is intertwined with the merits after full development of the facts is exactly the effect of the District Court's order. If CCA is actually convinced that its jurisdictional challenge is correct (which in itself is doubtful), CCA is free to raise the issue again before final judgment after the record is fully developed. If CCA is aggrieved of the ruling at that time, it may appeal the ruling with the final judgment. What CCA cannot do is insist that the District Court hold an evidentiary hearing at the time and place that CCA dictates, and then seek interlocutory review of a ***denial*** of its motion prior to final judgment. ***No authority*** from this court or any other supports that position. Consequently, CCA's claim of a split is illusory.

B. The order compelling arbitration

CCA claims that Section 4 of the FAA denies a district court the power to compel arbitration outside its district to conform to the parties' contractual forum selection clause. CCA maintains this position even when (as here) the litigation venue is proper for the interpleader action and chosen by a stranger to the agreement. Although Section 4 provides that the

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39 *See Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005) (dispute over amount in controversy).

40 *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003) (determining Eleventh Amendment immunity).

"hearing . . . shall be within the district," the District Court's order has no language to run afoul of this clause. It did not order arbitration outside the district. But, beyond any failure to show that CCA's reading of Section 4 has been violated, CCA attempts to sidestep the point of this Court's most recent case touching on the venue provisions of the FAA.

In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), this Court rejected a restrictive interpretation of the FAA's venue provisions. *Id.* at 195. This Court held that the venue provisions in Sections 9, 10 & 11 of the FAA venue ***do not supplant*** other venue rules; they supplement them. *Id.* Like sections 9, 10 and 11, section 4 should be viewed as discretionary, not mandatory, in keeping with the permissive, discretionary approach to venue in *Cortez*. Chase filed the lawsuit and chose the venue. Its choice was permissible. *Cortez* would read the FAA broadly to empower the District Court to promote the "rapid and unobstructed enforcement of arbitration agreements" by compelling arbitration. *Cortez*, 529 U.S. at 201 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983)).

The real question is the extent to which CCA's older and more restrictive cases survive this Court's holding. Only one of CCA's cases suggests an answer to that question, and it opines that *Cortez* prevails.[41]

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[41] The only cases cited by CCA to be decided after *Cortez Byrd Chips* are: *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214, 1218-19 (10th Cir. 2005) (following the strict approach without discussing this Court's authority); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir. 2003) (conceding the point with no discussion of

Correct or incorrect, this *dicta* from one circuit hardly constitutes a circuit split.

Even considering all of CCA's cases, none involves the situation (as here) where a stranger to the agreement filed the lawsuit in a court of proper venue and the court compelled arbitration, leaving it to the parties to hold the hearing within the district and waive their forum selection clause, or alternatively, to comply with the forum selection clause and hold it elsewhere. On the contrary, CCA's cases involve one of the parties themselves instigating litigation (often for purposes of gaming the system) in venues not specified in the parties' agreement.[42] Having cited no case involving the

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Cortez); and *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 785 n.1 (9th Cir. 2001) (suggesting *Lauer* did not survive *Cortez*).

[42] *Ansari*, 414 F.3d at 1216 (party to the agreement instigated litigation seeking to avoid arbitration in forum other than that chosen in the agreement); *Inland Bulk Transfer*, 332 F.3d at 1010 (same); *Textile Unlimited*, 240 F.3d at 784 (suit to enjoin arbitration brought in venue not chosen in the agreement); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 324 (7th Cir. 1995) (party to the agreement instigated litigation to compel arbitration in venue not chosen by the agreement); *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 328 (5th Cir. 1987) (suit to compel arbitration brought in Mississippi because Iranian revolution prevented effective arbitration in the forum chosen by the parties); *Dupuy-Busching Gen. Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275, 1277 (5th Cir. 1975) (motion to compel arbitration brought as counterclaim to improperly venued litigation instigated by contractual counterpart); *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1392 (3d Cir. 1974)

procedural setup here, CCA can hardly make an effective showing that this court ought to reach out and decide this issue, especially before final judgment.

III. CCA's New "Facial Attack" Ruling Is Neither Preserved Nor Worthy Of Certiorari

At the eleventh hour, CCA invokes *Bell Atlantic v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), in an effort to argue that the District Court used the wrong standard in determining its jurisdictional attack on the face of the pleadings. Pet. 16-21. Like the claims of a circuit split, this argument is also illusory.

One will look in vain in either of the orders below for the adjudication of a "facial attack." It is not there, because CCA's motion to dismiss presented a so-called "factual" challenge, and a "factual" challenge was all that was argued before the Fifth Circuit.[43] Even if a factual challenge had been made and preserved for review, CCA cites no post-*Bell* authority to support its argument, because there is none. The extent to which *Bell* applies outside the unique concerns of anti-trust cases, as well as the extent to which pleading burdens are altered for

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(suit to compel arbitration brought in district where franchisee resided rather than in district where the parties agreed to hold the hearing).

[43] The only thing resembling a "facial" challenge made in the District Court was CCA's request that Chase be forced to replead its interpleader counts. That request was denied in a separate order, from which CCA never sought review of the circuit court.

interpleader claims specifically, has not received attention from the circuit courts sufficient to ripen that issue for review by certiorari.

IV. A Word About State Court Interference And The Oklahoma Supreme Court

CCA's request for certiorari is not bolstered by arguing that the District Court was interfering with CCA's state court litigation and refusing to follow the Oklahoma Supreme Court. The District Court cannot be faulted for refusing to defer to the state action because CCA never requested such deference.

CCA ***never*** argued below that the Oklahoma Supreme Court decision was preclusive. Indeed it could not have. The District Court decided the arbitrability question ***before*** the Oklahoma Supreme Court decision. CCA never moved for rehearing based upon the Oklahoma court decision. Little wonder.

The Oklahoma court did not fully and finally resolve the issue of arbitrability. It merely remanded the case to the trial court for additional proceedings—proceedings that could very well result in arbitration of all or part of the dispute. It held that "[o]n remand, the [state] district court must conduct an evidentiary hearing on the existence of a valid and enforceable arbitration agreement and the expense of arbitration . . . before deciding which, if any, of CCA's claims are subject to an enforceable arbitration agreement."[44]

Most importantly, the Oklahoma court's pronouncements on this issue are not controlling. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984)

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[44] App.185.

(rejecting view that state law can bar enforcement of FAA). In *Southland*, this Court rejected any notion that a state law could undermine the FAA, even if a state's highest court had previously found ***no*** FAA preemption. *Id.* at 858 (state law that certain state law claims not subject to arbitration is preempted by FAA). Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the Court again rejected state laws interference with the FAA's preeminence by requiring arbitration of efforts to void a contract under state law. *Id.* at 445-46. Whatever the thoughts and musings of the Oklahoma court, the District Court's orders are in complete conformity with federal law and the precedents of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENDALL M. GRAY
Counsel of Record
ANDREWS KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
(713) 220-3981

Counsel for Interpleader Claimant
Real Parties In Interest

November 15, 2007

ASSIGNMENT OF CONTRACT RIGHTS

American Oncology Resources, Inc., a Delaware corporation ("Assignor"), the present legal and equitable owner of the contract rights hereinafter described, for good and valuable consideration paid to Assignor, the receipt and sufficiency of which are hereby acknowledged, has sold, transferred, assigned and conveyed, and by these presents does hereby sell, transfer, assign and convey unto AOR Management Company of Oklahoma, Inc., a Delaware corporation ("Assignee") that is a wholly owned subsidiary of Assignor, all revenues, payments, profits, proceeds, awards, compensation, instruments, documents, actions, causes of action, benefits, rights, refunds, monies and property of every kind, type, nature and description now or hereafter owing or to become owing or in any way or manner whatsoever arising out of, connected with or emanating from that one certain Management Services Agreement, effective March 1, 1995, between the Assignor, as successor-in-interest to Oncology and Hematology Management Partnership, a Texas general partnership, and Oklahoma Oncology & Hematology, P.C., an Oklahoma professional corporation (the "Management Services Agreement"), together with all assurances thereof, and all other rights, powers, privileges and remedies of Assignor thereunder (the "contract rights").

To have and to hold the contract rights, together with all rights and appurtenances thereto in anywise belonging unto Assignee, its successor or assigns forever.

Assignor hereby transfers and assigns to Assignee all of Assignor's rights and interest in and

to all of the contract rights, and Assignor further hereby expressly subrogates Assignee to all of Assignor's rights, powers, liens, titles, interests and remedies under the contract rights and all instruments, documents and other writings evidencing, securing or pertaining thereto. Assignor hereby expressly warrants and represents to Assignee, its successors or assigns, that all of the instruments, documents, writings and agreements giving rise to the contract rights are genuine, valid and enforceable, that Assignor is the sole legal and equitable owner and holder of the contracts rights, that Assignor has all right, power and authority to execute and deliver this Assignment of Contract Rights and to sell, transfer, assign and convey the contract rights to Assignee without the consent or joinder of any other person or entity, that the contract rights are all of the contract rights covering the property described or referred to therein, that Assignor has not previously assigned or conveyed any of the contract rights or any interest therein, that Assignor has not received notice that Assignor is in material default under any of the instruments, documents, writings or agreements giving rise to the contract rights, that none of the other parties to any of the instruments, documents, writings or agreements giving rise to the contract rights are in material default thereunder and that there have been no oral or written amendments or modifications of the instruments, documents, writings or agreements giving rise to the contract rights.

By its acceptance of this assignment of the contract rights, as evidenced by execution of this instrument, Assignee accepts, assumes and agrees to perform each and every obligation and liability (absolute or contingent) of Assignor under the

Management Services Agreement and otherwise in connection with the contract rights from and after the date of this Assignment.

Executed effective this 1st day of March, 1995.

AMERICAN ONCOLOGY RESOURCES, INC.

By: /s/
R. Dale Ross

AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.

By: /s/
R. Dale Ross

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.	§	
	§	
v.	§	CIVIL ACTION NO. 4:06-CV-00645
	§	
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C., d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC. and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.	§	

COUNTY OF OKLAHOMA)
) SS
STATE OF OKLAHOMA)

AFFIDAVIT OF PAUL W. BUKOFZER

1. That I obtained, in 1985, a Master's of Public Health degree from the University of Oklahoma in Health Administration and have in excess of twenty-five (25) years of health care management experience;

2. That from 1992 to 1995 I was employed as Chief Executive Officer of Cancer Care Associates, Inc., an Oklahoma Professional

Corporation which was dissolved in 1995, simultaneously with the formation and incorporation of Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates (CCA);

3. That from 1995 until 1999, as an employee of AOR Management Company of Oklahoma, Inc. (AOR-OK). I served as the Executive Director for CCA;

4. That in 1999 I became Regional Vice President and later, Senior Vice President of Regional Operations, for US Oncology (USON) and served in that capacity until 2001, at which time I resigned from USON;

5. That from 2001 to April, 2006, I provided physician practice management consultation and expert services to physician group practices, medical service organizations, academic centers, hospital, and hospital systems – including CCA;

6. That on April 18, 2006 I returned to CCA's employment as Executive Director of CCA's practice and have been employed in that position since April, 2006 until the present;

7. That as a result of my various positions, I have direct and personal knowledge of, and am familiar with, CCA's books and records, as well as CCA's relationship with AOR-OK and USON;

8. That I have personally been involved with issues related to this interpleader action from its inception and am familiar with the nature of the monies which make up the interpleader fund;

9. Employees of US Oncology, Inc., (USON's) corporate personnel, kept and maintained all of Oklahoma Oncology & Hematology, PC (CCA's financial books and records;

10. CCA's financial books and records were maintained as a business unit (#46702) of USON;

11. AOR Management Company of Oklahoma's (AOR-OK's) financial books and records were maintained as a business unit (#46700) of USON;

12. USON officers are the same as AOR-OK's;

13. AOR-OK management personnel were directly supervised by USON corporate personnel;

14. USON corporate personnel regularly attended CCA Board meetings and served as AOR-OK's representative on the policy board, and established and/or strongly influenced or vetoed policy of CCA;

15. All management company employees of AOR-OK participated in USON's 401(k) plan, as there was not a plan for AOR-OK;

16. All employees, both of CCA and AOR-OK participated in USON's health, dental, short and long term disability, life, AD&D insurance plans, as none existed for either CCA or AOR-OK;

17. Reimbursement Policies and Procedures, governing the billing and collection of CCA's patient accounts, were promulgated by and in the name of USON;

18. USON corporate personnel routinely audited AOR-OKs central business office in Tulsa, and directed the billing and collection activities of CCA;

19. USON established and set the fees charged by CCA physicians to CCA patients using a national fee schedule;

20. Human Resource policies and procedures, governing employees of both CCA and AOR-OK, were one in the same, and promulgated by and in the name of USON;

21. Policy and Procedure manuals did not reference AOR-OK; however, many listed "US ONCOLOGY OK" and were issued by a subcommittee of USON;

22. USON granted the leases entered into by AOR-OK on behalf of CCA;

23. USON set, established, and administered the wage and salary program for CCA and AOR-OK employees;

24. Leases entered into in the name of AOR-OK on behalf of CCA, were actually executed by employees of USON (none of which were officers of AOR-OK);

25. USON management personnel unilaterally opened and closed CCA bank accounts without CCA's consent;

26. USON management personnel (predominantly treasury department employees) managed and directed the daily sweeps of CCA's bank accounts;

27. Radiation therapy, Nursing, Chemotherapy Administration, and Pharmacy Admixture policies and procedures, governing patient care, were written and promulgated by USON;

28. USON intercepted Office of Inspector General (OIG) correspondence intended for CCA, and responded directly to the OIG;

29. USON's marketing materials, such as their web-site (www.usoncology.com) and annual reports do not (did not) mention AOR-OK. Routine references, terms and phrases such as:

- "US Oncology provides comprehensive management services"
- "US Oncology enters into management agreements"
- "US Oncology physicians"

- "US Oncology affiliated physicians"
- "US Oncology affiliated practices"
- "US Oncology patients"
- "US Oncology has grown into the nation's largest network devoted exclusively to cancer treatment and research"

30. To my knowledge, AOR-OK did not have a logo or printed corporate letterhead/ stationary;

31. AOR-OK used CCA business cards and stationary, without any reference to AOR-OK;

32. All employees of both CCA and AOR-OK had USON e-mail addresses (firstname.lastname @usoncology.com);

33. Numerous employees of both CCA and AOR-OK did not know that AOR-OK even existed and all employees of AOR-OK were believed by CCA and AOR-OK employees to be employees of USON;

34. All CCA and AOR-OK employee terminations had to be approved by USON corporate personnel;

35. CCA's administrative assistant (actually an AOR-OK employee) to the Executive Director (Zack Varughese), held and

maintained the CCA corporate seal was not aware of, nor has ever seen, a corporate seal for AOR-OK;

36. Brandon Mudd, state controller, prepared the annual operating and capital budgets of CCA within the guidelines directed by USON; budgets were approved by USON prior to presentation to CCA;

37. All meetings and negotiations with CCA to modify the existing MSA, enter into a new, different management model, or terminate the MSA were conducted directly with USON management personnel;

38. All purchasing contracts for supplies and equipment purchased by (or on behalf of) CCA were directly negotiated or placed by USON management personnel;

39. The Executive Director (Zack Varughese) and State Controllers (Brandon Mudd and Glenn Noble) received daily direction from USON management personnel and uploaded information to USON personnel on a daily basis;

40. USON established financial targets and guidelines to measure the performance of AOR-OK management employees and gave bonuses based on attaining those targets;

41. USON held itself out to pharmaceutical companies as the purchasing agent of CCA and collected and retained fees therefore over CCA's objections;

42. AOR-OK and CCA were required to purchase drugs from USON or USON interests without competitive bidding and over CCA's objections;

43. USON sold sales data regarding CCA at the profit of USON;

44. CCA had e-mail and computer communications service only through USON;

45. USON drafted, generated and controlled all contracts, including physician employment contracts, of both AOR-OK and USON;

46. In general, USON exerted control over every aspect of CCA's business, administrative and financial obligations, to which CCA continued to protest, and withheld the use of CCA operational revenues in the event CCA attempted to obtain independent advice of legal or accounting personnel not approved by USON. Without access to CCA's revenues, in 2004 forward, all dependent legal and accounting services were deducted from physician compensation;

47. USON dominated and controlled CCA through the confiscation of its revenues and accounts which were, in 2002 removed from the State of Oklahoma to JPMorgan Chase Bank, in Houston, Texas, without CCA's consent;

48. That I have read CCA's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Brief in Support and am familiar with the contents thereof, and that the facts contained therein are true and correct.

/s/
PAUL W. BUKOFZER

COUNTY OF OKLAHOMA)
) SS
STATE OF OKLAHOMA)

VERIFICATION

I, PAUL W. BUKOFZER, being first duly sworn upon oath, allege and state that I have read the above and foregoing Affidavit, am familiar with the contents thereof, and that the facts and matters stated therein are true and correct.

/s/
PAUL W. BUKOFZER

Subscribed and sworn before me, a Notary Public in and for the State of Oklahoma, on this the ___ day of March, 2007.

[SEAL]

/s/
NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

(Corporation or Limited Liability Company)

1. The name of the entity as it currently appears on the records of the Secretary of State of Texas is American Oncology Resources, Inc.

2. (If the entity's name was previously unavailable and the entity elected to use an assumed name in Texas, complete the following.) The assumed name of the entity as it currently appears on the records of the Secretary of State is N/A .

3. A Certificate of Authority was issued to the entity on December 20, 1993.

4. The name has been changed to US Oncology, Inc.

5. The applicable, the name which it elects to use hereafter in the state of Texas is US Oncology, Inc.

6. It desires to pursue in Texas purposes other than, or in addition to, those authorized by its Certificate of Authority, as follows: to engage in any lawful business, act or activity for which corporations may be organized under the Business Corporation Act of the State of Texas.

It is authorized to pursue such purpose or purposes in the state or county under the laws of which it is organized.

7. It desires to change the statement(s) contained in item(s) number one (1) of the original or amended Certificate of Authority to read as follows:

"The name of the corporation is US Oncology, Inc."

American Oncology Resource, Inc.,
a Delaware corporation

By: /s/
Name: R. Dale Ross
Title: President

Resp. App. 16

PURCHASE AGREEMENT

BY AND AMONG

AMERICAN ONCOLOGY RESOURCES, INC.,

AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.,

CANCER CARE ASSOCIATES, INC.,

ALEDA A. TOMA, M.D., SOLE PROPRIETORSHIP

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.

GEORGE W. SCHNETZER, III, M.D., JOHN M. SEXAUER, M.D.

ALAN M. KELLER, M.D., JAMES A. YOUNG, M.D.

CHARLES M. STRNAD, M.D., JOHN B. BENEAR, II, M.D.,

KEVIN S. WEIBEL, D.O., BRIAN V. GEISTER, M.D.,

GREGORY A. PARKER, M.D., CHARLES W. HOLLEN, M.D.,

WILLIAM L. HUGHES, M.D., CHRISTOPHER A. PUCKETT, M.S.

CRAIG L. REITZ, M.D., MICHAEL J. KEEFER, M.D.,

RONALD P. KUBICA, M.D., MARIL J. WEBER, M.D.

AND ALEDA A. TOMA, M.D.

* * *

PURCHASE AGREEMENT

This Purchase Agreement ("Purchase Agreement"), dated as of March 24, 1995 but effective for all purposes as of March 1, 1995, is by and among AMERICAN ONCOLOGY RESOURCES, INC., a Delaware corporation ("AOR"); AOR MANAGEMENT COMPANY OF OKLAHOMA, INC., a Delaware corporation ("AOR Management"); CANCER CARE ASSOCIATES, INC., an Oklahoma professional corporation ("CCA"); Aleda A. Toma, M.D., a sole proprietorship ("Toma SP") (CCA and Toma SP shall be collectively referred to herein as the "Existing Practices"); Oklahoma Oncology & Hematology, P.C., an Oklahoma professional corporation '("New PC"); George W. Schnetzer, III, M.D., John M.. Sexauer, M.D., Alan M. Keller, M.D., James A. Young, M.D., Charles M. Strnad, M,-D., John B. Benear, II, M.D., Kevin S. Weibel, D.O., Brian V. Geister, M.D., Gregory A. Parker, M.D.; Charles W. Hollers, M.D., William L. Hughes, M.D., Christopher A. Puckett, M.D., Craig L. Reitz, M.D., Michael J. Keefer, M.D., Ronald P. Kubica, M.D., Maril J. Weber, M.D., and Aleda A. Toma, M.D. ("Toma") (collectively, the "Physicians" and individually, a "Physician") (all of the Physicians other than Toma shall be collectively referred to as the "CCA Physicians") (AOR, AOR Management, CCA, Toma SP, New PC, and the Physicians are individually referred to herein as a "Party" and collectively referred to herein as "Parties").

RECITALS

A. New P and New PC have entered into that certain Management Services Agreement dated of even date herewith but effective for all purposes as of March 1; 1995, pursuant to which New P manages the non-medical aspects of the Practice.

B. AOR desires to acquire all of the partnership interests of Oncology and Hematology Management Partnership, a Texas general partnership ("New P"), and to thereby assume all of New P's right title and interest in and to the Management Services Agreement.

C. In furtherance of the foregoing, and in connection with the transactions contemplated by the Master Transaction Agreement, dated as of March 24, 1995 but. effective for all purposes as of March 1, 1995, among the Parties (the "Master Transaction Agreement"), the Physicians desire to sell 100% of their partnership interests in New P, and AOR desires to purchase 100% of the Physicians' partnership interests in New 'P, which, together with the partnership interests in New P owned by the Employees, constitute 100% of the Partnership interests in New P.

D. In addition, in connection with the transactions contemplated by the Master Transaction Agreement, each Existing Practice desires to sell and transfer all of its nonmedical assets, and AOR Management desires to purchase and acquire such nonmedical assets and desires to assume certain liabilities of such Existing Practice.

E. In addition, in connection with the transactions contemplated by the Master Transaction Agreement, CCA desires to sell 100% of

the outstanding capital stock in CCA Subco, Inc., an Oklahoma corporation and the wholly owned subsidiary of CCA ("Subco"), to AOR Management, and AOR Management desires to purchase 100% of the outstanding capital stock of Subco.

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

ARTICLE I
DEFINITIONS

Any capitalized term not defined herein shall have the meaning ascribed to such term in the Master Transaction Agreement.

ARTICLE II
TERMS OF PARTNERSHIP INTEREST PURCHASE

Section 2.01 Purchase and Sale. Subject to the terms and conditions set forth herein and in the Master Transaction Agreement, and in reliance upon the representations, warranties and covenants set forth herein, at the Closing, each Physician agrees to sell and hereby sells to AOR, and AOR agrees to purchase and hereby purchases from each such Physician, the partnership interest of New P set forth after such Physician 's name on the Disclosure Schedule. Each Physician's partnership interest of New P is hereinafter referred .to as "Partnership Interest," and all such partnership interests of New P are hereinafter referred to as "Partnership Interests."

Section 2.02 Consideration for Such Transfer. In consideration for the aforesaid transfer of the Partnership Interests, AOR shall deliver the following consideration to the Physicians in the amounts and on the dates set forth below.

(a) At the Closing, AOR shall deliver to each Physician cash in the amount set forth opposite such Physician's name:

Physician	Cash Amount
George W. Schnetzer, III, M.D.	$ 388,987
John M. Sexauer, M.D.	$ 700,974
Alan M. Keller, M.D.	$ 672,485
James A. Young, M.D.	$ 714,164
Charles M. Strnad, M.D.	$ 698,278
John B. Benear, II, M. D.	$ 582,809
Kevin S. Weibel, D.O.	$ 609,982
Brian V. Geister; M.D.	$ 662,668
Gregory A. Parker, M.D.	$ 616,208
Charles W. Hollen, M.D.	$ 628,295
William L. Hughes, M.D.	$ 505,643
Christopher A. Puckett, M.D.	$ 243,788
Craig L. Reitz, M. D.	$ 652,685
Michael J. Keefer, M.D.	$ 447,868
Ronald P. Kubica, M.D.	$ 404,391
Maril J. Weber, M.D.	$ 371,088
Aleda A. Toma, M.D.	$ 1,068,750
	$ 9,969,053

Payments of the cash amounts set for .the above shall be made by AOR by wire transfer in immediately available funds to bank accounts designated by each of the Physicians.

(b) At the Closing, AOR shall deliver to each Physician a Note in the original principal amount set forth opposite such Physician's name:

Physician	Principal Amount of Note
George W. Schnetzer, III, M.D.	$ 210,218
John M. Sexauer, M.D.	$ 209,476
Alan M. Keller, M.D.	$ 212,594
James A. Young, M.D.	$ 212,404
Charles M. Strnad, M.D.	$ 208,877
John B. Benear, II, M. D.	$ 206,119
Kevin S. Weibel, D.O.	$ 189,255
Brian V. Geister; M.D.	$ 301,445
Gregory A. Parker, M.D.	$ 476,597
Charles W. Hollen, M.D.	$ 193,325
William L. Hughes, M.D.	$ -0-
Christopher A. Puckett, M.D.	$ 54,175
Craig L. Reitz, M. D.	$ 695,607
Michael J. Keefer, M.D.	$ 591,030
Ronald P. Kubica, M.D.	$ 179,730
Maril J. Weber, M.D.	$ 185,544
Aleda A. Toma, M.D.	$ 831,250
	$ 4,957,646

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ARTICLE XI
ARBITRATION

Section 11.01 Mediation and Arbitration. Any dispute, controversy or claim (including without limitation tort claims, requests for provisional remedies or other interim relief, and issues as to arbitrability of any matter) arising out of this

Purchase Agreement, or the breach thereof, that cannot be settled through negotiation shall be settled (a) first, by the parties trying in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA") (such mediation session to be held in Tulsa, Oklahoma, and to commence within 15 days of the appointment of the mediator by the AAA), and (b) if the controversy, claim or dispute cannot be settled by mediation, then by arbitration administered by the AAA under its Commercial Arbitration Rules (such arbitration to be held in Tulsa, Oklahoma before a single arbitrator and to commence within 15 days of the appointment of the arbitrator by the AAA), and- judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.